PENERBIT SAHABAT (M) SDN BHD & ANOR v. KALAIRASI ARUMUGAM

COURT OF APPEAL, PUTRAJAYA
ROHANA YUSOF JCA
AHMADI ASNAWI JCA
BADARIAH SAHAMID JCA
[CIVIL APPEAL NO: W-02(NCVC)(W)-957-05-2014]
12 NOVEMBER 2015

TORT: *Defamation – Defamatory words – Allegation that article in newspaper damaged respondent's reputation – Whether misprint – Whether appellants rectified mistake at earliest possible opportunity – Whether article regarded as capable of referring to respondent – Whether article led reasonable people who knew respondent to conclude that paragraph referred to respondent*

The plaintiff's ('respondent') cause of action against the defendants ('appellants') arose from the publication of an article wherein the respondent alleged that the contents of the article carried certain imputations/allegations and innuendos which were defamatory of the respondent, had injured her name and reputation. The appellants was alleged to have published an article relating to an interview between one Sarathi Krishnan, a local actor, dramatist and singer and one Sujatha, also a local actress. Sujatha, during the interview, had narrated her experiences in the performing arts and her life. However, when the article was published, the appellants had inadvertently published the picture of the respondent in place of Sujatha. Hence, the respondent claimed that a portion of the text, particularly the excerpt '... I fell in love with Poobalan and married him. I have two daughters by the name of Tharshana and Thulasi ...' were defamatory of her, in that, the article imputed that she had been married previously and hence, damaged her reputation. The respondent also claimed that her photograph was published without her knowledge and consent. The appellants, on the other hand, contended that article was not defamatory of the respondent and that the content of the article as a whole referred to Sujatha and not the respondent notwithstanding that the respondent's photograph was published along with the article. The appellants further admitted that there was a misprint and the mistake had been rectified at the earliest possible opportunity upon discovery of the mistake. The trial judge found that the respondent had proved her claim of defamation against the appellants on the balance of probabilities and hence, the appeal by the appellants. The grounds of appeal raised by the appellants were that: (i) the words in the said article did not refer to the respondent and the trial judge had erred in law and in fact when she held that an inference could be drawn that the said article referred to the respondent; and (ii) that the words complained of were not defamatory.

Held (allowing appellants' appeal)
Per Ahmadi Asnawi JCA delivering the judgment of the court:

(1) The trial judge fell into error when she failed to take into consideration the whole paragraph of the statement but instead relied solely upon the impugned words to come to her findings. The offending excerpt could not be read in isolation. It must be read in reference to the whole paragraph to obtain its full purport on account that it was purely an interview between Sarathi Krishnan and Sujatha and that the said statement was made by Sujatha and referred to Sujatha. The whole paragraph was Sujatha's brief narrative of her life and involvement in the arts scene and had nothing to do with the respondent's personal life. (paras 25 & 26)

(2) The article had not once referred to the respondent either by her name or through other means. The translation of the whole article only made reference to Sujatha's name. The respondent's name, Kalaiarasi a/p Arumugam could not be found at all. Even the photograph made no reference as regards to the identity of the person therein. The testimonies of witnesses also did not run in tandem with the trial judge's findings that any reader of the article, with the caption beside her photograph, would infer that the respondent was Sujatha. (paras 24, 27 & 28)

(3) The impugned words in the article, having regard to its language, could not be regarded as capable of referring to the respondent, despite the fact that the photograph of the respondent was published together with the said article. Hence, the inference made by the trial judge was devoid of any foundation. Further, the article, in particular the paragraph with the impugned words, did not lead reasonable people who knew the respondent to the conclusion that the paragraph referred to the respondent. (paras 30 & 31)

Bahasa Malaysia *Headnotes*

Kausa tindakan plaintif ('responden') terhadap defendan-defendan ('perayu-perayu') berbangkit daripada penerbitan artikel di mana responden mendakwa kandungan artikel tersebut mengandungi tohmahan/dakwaan dan innuendo tertentu yang memfitnah responden, memburukkan nama dan reputasinya. Perayu-perayu dikatakan telah menerbitkan artikel berkaitan dengan temu bual antara Sarathi Krishnan, seorang pelakon tempatan, dramatis dan penyanyi dan Sujatha, juga pelakon tempatan. Semasa temu bual tersebut Sujatha telah menceritakan pengalamannya dalam seni lakonan dan kehidupannya. Walau bagaimanapun, apabila artikel tersebut diterbitkan, perayu-perayu dengan tidak sengaja telah menerbitkan gambar responden di tempat Sujatha. Oleh itu, reponden mendakwa bahawa bahagian teks, khususnya petikan '... saya jatuh cinta dengan Poobalan dan mengahwininya. Saya mempunyai dua orang anak perempuan bernama Tharshana dan Thulasi ...' adalah memfitnah, di mana, artikel tersebut

memberikan tohmahan bahawa dia pernah berkahwin sebelum ini dan dengan itu, memburukkan reputasinya. Responden juga mendakwa bahawa gambarnya diterbitkan tanpa pengetahuan dan kebenarannya. Sebaliknya, perayu-perayu menghujahkan bahawa artikel tersebut tidak memfitnah responden dan kandungan artikel secara keseluruhannya merujuk kepada Sujatha dan bukan responden walaupun gambar responden dipaparkan berserta dengan artikel tersebut. Perayu-perayu selanjutnya mengakui bahawa berlaku kesalahan cetak dan kesilapan tersebut telah dibetulkan dalam peluang terawal selepas mengetahui tentang kesilapan. Hakim bicara mendapati bahawa responden telah membuktikan tuntutan fitnah terhadap perayu-perayu atas imbangan kebarangkalian dan oleh itu, rayuan oleh perayu-perayu. Alasan-alasan rayuan yang dibangkitkan oleh perayu-perayu adalah bahawa: (i) perkataan-perkataan dalam artikel tersebut tidak merujuk kepada responden dan hakim bicara khilaf dari segi undang-undang dan fakta apabila memutuskan bahawa inferens boleh dibuat bahawa artikel tersebut merujuk kepada responden; dan (ii) bahawa perkataan-perkataan yang diadukan tidak memfitnah.

Diputuskan (membenarkan rayuan perayu-perayu)
Oleh Ahmadi Asnawi HMR menyampaikan penghakiman mahkamah:

(1) Hakim bicara khilaf apabila gagal mempertimbangkan keseluruhan perenggan dalam kenyataan tersebut tetapi sebaliknya bersandar semata-mata atas perkataan-perkataan yang dipersoalkan untuk membuat dapatannya. Petikan yang menyinggung tidak boleh dibaca secara berasingan. Ia perlu dibaca dengan merujuk kepada keseluruhan perenggan untuk mendapatkan tujuan penuh mempertimbangkan bahawa ia adalah hanya temu bual antara Sarathi Krishnan dan Sujatha dan bahawa kenyataan tersebut dibuat oleh Sujatha dan merujuk kepada Sujatha. Keseluruhan perenggan adalah ringkasan kisah hidup Sujatha dan penglibatannya dalam arena seni dan tidak berkait langsung dengan kehidupan peribadi responden.

(2) Tiada di mana-mana artikel tersebut merujuk kepada responden sama ada melalui namanya atau cara yang lain. Penterjemahan keseluruhan artikel hanya merujuk kepada nama Sujatha. Nama responden, Kalaiarasi a/p Arumugam, langsung tidak didapati di mana-mana. Malahan, gambar tersebut tidak merujuk kepada identiti orang di dalamnya. Keterangan saksi-saksi tidak selari dengan dapatan hakim bahawa seseorang pembaca artikel, dengan kapsyen bersebelahan gambarnya, akan menganggap bahawa responden ialah Sujatha.

(3) Perkataan-perkataan yang dipersoalkan dalam artikel tersebut, mempertimbangkan bahasanya, tidak boleh dianggap sebagai merujuk kepada responden, walaupun dengan fakta bahawa gambar responden diterbitkan bersama-sama dengan artikel tersebut. Oleh itu, inferens yang dibuat oleh hakim bicara tidak berasas. Selanjutnya, artikel tersebut, khususnya perenggan dengan perkataan-perkataan yang

dipersoalkan, tidak membawa seseorang yang munasabah yang mengenali responden kepada kesimpulan bahawa perenggan tersebut merujuk kepada responden.

Case(s) referred to:

Ayob Saud v. TS Sambanthamurthi [1989] 1 CLJ 152; [1989] 1 CLJ (Rep) 321 HC ***(refd)***

Knupffer v. London Express Newspaper Ltd [1944] AC 116 ***(refd)***

Masterskill (M) Sdn Bhd v. Sistem Televisyen Malaysia Bhd [2012] 5 CLJ 296 HC ***(refd)***

Tan Sri Dato' Seri Halim Mohammad v. Syed Ahmad Tun (Dr) Syed Nasir & Anor [2013] 8 MLJ 348 ***(refd)***

For the appellant - Dinesh Athinarayan; M/s Kanapaty Dinesh & Co
For the respondent - Avtar Singh Dhaliwal (Devinder Kaur with him); M/s AS Dhaliwal

[Appeal from High Court, Kuala Lumpur; Civil Suit No: 23(NCVC)-137-12-2012 (overruled)]

Reported by S Barathi

JUDGMENT

Ahmadi Asnawi JCA:

[1] The respondent/plaintiff, aged 29, is a married woman with one child and held the office of Assistant Secretary General of the Selangor Indian Chambers of Commerce and Industry.

[2] The first appellant/first defendant is the owner, publisher and editor of the newspaper known as Malaysia Namban.

[3] The second appellant/second defendant is the Chief Editor of Malaysia Namban.

[4] The respondent's cause of action against the appellants arose from the publication of an article dated 18 December 2011, wherein the respondent alleged that the contents of the said article carry certain imputations/ allegations and innuendos which are defamatory of the respondent, had injured her name and reputation, her position at work and caused her anxiety and to be hated by members of the public at large.

The Background

[5] The appellants published an article named "Nerukku Ner" on 18 December 2011 in Malaysia Namban Sunday Edition relating to an interview between one Mr Sarathi Krishnan, a local actor, dramatist and singer and one Ms Sujatha (Sujah) also a local actress. The full text of this interview is at p. 363 Rekod Rayuan (RR) Jilid 2(3) – Bahagian B and C. Its English translation appeared at pp. 364 and 365 of the same Jilid.

[6] Ms Sujatha was the interviewer. In the said article, during the course of the interview, Mr Sarathi Krishnan had posed certain questions to Ms Sujatha, to which she then narrated her experiences in the performing arts and her life.

[7] The article had also published the pictures of Mr Sarathi Krishnan but instead of publishing the picture of Ms Sujatha, the appellants had inadvertently published the picture of the respondent.

[8] The relevant portion giving rise to this suit as narrated by Sujatha @ Sujah appeared at p. 365 of the same Jilid, which reads:

> In the year 1986, I was studying in Vivekanantha School, and the school teacher Puvaneswary organised a drama contest. Ten schools participated in this drama contest. In this competition our school won the first prize. Then I took up Baratham. **I fell in love with Poobalan and married him. I have two daughters by the name of Tharshana and Thulasi. I have enrolled my elder daughter in the same school where I studied**. (emphasis added)

[9] The respondent claimed a portion of the above text, as bolden were defamatory of her. She imputes that by publishing the said contents and the respondent's picture in the said article, it was imputed that the respondent had been married previously and had fell in love with a gentleman named Poobalan and had mothered two children from that marriage.

[10] The respondent claimed that the said article and photograph which were published together made out that the respondent was Sujatha, a young talent in music and a dancer who is married with two children.

[11] The respondent also claimed that the article had ruined her marriage with her husband and had damaged her reputation amongst her family, friends and the public at large. She claimed that it imputed that she was married before to the said Poobalan and has two children by him.

[12] The respondent claimed that her photograph was published without her knowledge and consent and that the appellants have failed to take all reasonable steps to ensure that the article that was published was fair and correct. Additionally the respondent claimed that the correction published on 25 December 2011 was never informed to the respondent until the respondent took this action against the appellants.

The Appellants' Defence

[13] The appellants pleaded that the said article, in its title and contents are not defamatory of the respondent as the same is a published interview between one Mr Sarathi Krishnan and Ms Sujatha and the contents of the article as a whole and not just an excerpt of it as referred to by the respondent, refers to Sujatha and not the respondent notwithstanding that the respondent's photograph was published along with the article.

[14] In its defence and evidence in court, the appellants admitted that there was a misprint of the respondent's photograph instead of Sujatha's in the said article and that they had made a mistake.

[15] The appellants then contended that they had rectified the said mistake at the earliest possible opportunity upon discovery of the said mistake by publishing on the following Sunday (25 December 2011) a corrective article and an expression of regret in terms as follows (as found at p. 368 (English translation) of the same Jilid):

> In last Sunday, "Neruku Ner Section" Sujatha was the one who interviewed Sarathi Krishnan. But instead of publishing her photograph we published the photo of Mrs Kalaiarasi and we regret for the mistake publishing.

A photograph of Sujatha was also published.

[16] The appellants also posited the defence of justification in regards to the contents of the said article that the contents refers to Sujatha and not the respondent despite the wrong photograph being published.

Findings Of The Learned Trial Judge

[17] On the issue of whether the words in the article referred to the respondent/plaintiff, the learned judge found (for the respondent) as follows, at pp. 14 and 15, RR Tambahan:

> 16. Anyone reading that article or even looking at the article cannot fail to notice the photograph of the plaintiff which is prominently displayed at the lower right hand corner of the article. The plaintiff in the photograph was dressed in her wedding finery and her photograph is brightly coloured, in contrast to the more muted colours of the person interviewed. With the caption beside her (although the defendants argue was nothing more than a subtitle) any reader of the article would naturally infer that the plaintiff is the interviewer "Sujatha".
>
> [17] This inference is indeed drawn by friends, relatives and members of the public who knew the plaintiffs and her parents because her father, PW1, testified of his customers who knew the plaintiff, asking him about the article. The plaintiff (PW3) herself, testified about her late mother receiving calls and inquiries about the article. Even her employer (PW2) queried her about the article.
>
> [18] It is my view that even though the plaintiff's name was never mentioned but that of "Sujatha", by the publication of the plaintiff's photograph prominently displayed together with the article, a reasonable inference can be drawn that it did refer to the plaintiff, given that it is not uncommon for writers of such articles to use a *nom de plume*".

[18] As regards as to whether the said article is defamatory of the plaintiff, the learned judge found, at p. 18, RR Tambahan:

> 23. From the evidence as adduced I am satisfied that the words were defamatory of her as it carried the imputation that she had a "past history" of a previous marriage with another man and had 2 children as a result of that marriage. Applying the test in *Chok Fook Choo*, I find that the article read as a whole had imputed dishonourable conduct on the part of the plaintiff for which she had suffered a time of tumultuous

upheaval in her marriage (which was already fragile and breaking at the seams) as well as having to endure the censure and suspicious of her family, relatives and friends.

[19] The learned judge found that the respondent/plaintiff has proved her claim of defamation against the appellants/defendants on the balance of probabilities and awarded a sum of RM80,000 as general damages. No costs appeared to have been awarded to the respondent.

[20] Hence this appeal before us by the appellants against the said judgment.

The Appellants' Appeal

[21] The appellants did not dispute that the words in the said article was in fact published on 18 December 2011. The appeal thus was grounded upon two broad grounds:

(i) that the words in the said article did not refer to the respondent and the learned judge has erred in law and in fact when she held that an inference can be drawn that the said article refers to the respondent;

(ii) that the words complained of are not defamatory.

[22] In a defamation suit, the burden is upon the respondent/plaintiff to prove whether the words refer to the respondent; whether the words are defamatory; and that the words are published - see *Ayob Saud v. TS Sambathamurthi* [1989] 1 CLJ 152; [1989] 1 CLJ (Rep) 321; *Tan Sri Dato' Seri Halim Mohammad v. Syed Ahmad Tun (Dr) Syed Nasir & Anor* [2013] 8 MLJ 348.

Our Decision

First Ground - Whether The Words In The Said Article Refer To The Respondent

[23] The respondent alleges that by the fact that her photograph was published in the said article, it follows that the words in the said article refers to her. This was the only ground subscribed by her to substantiate her claim that the said words referred to her.

[24] We have gone through the evidence and found that the article had not once referred to the respondent either by her name or through other means. The translation of the whole article as seen at p. 365 of Bahagian B & C Jilid 2(3) RR, only made reference to Sujah's (Sujatha) name. The respondent's name, Kalaiarasi a/p Arumugam cannot be found at all. Even the photograph made no reference as regards to the identity of the person therein.

[25] The offending excerpt "... I fell in love with Poobalan and married him. I have two daughters by the name of Tharshana and Thulasi ..." cannot be read in isolation. It must be read in reference to the whole paragraph to obtain its full purport on account that it is purely an interview between Mr Sarathi Krishnan and Sujatha and that the said statement is made by

Sujatha and refers to Sujatha. It was a brief narrative by Sujatha of her life and her involvement in the local arts scene. For purposes of clarity, the paragraph started with:

> Sujah: In the year 1986, I was studying in Vivekanantha school and the school teacher Purvaneswary organised a drama contest. Ten schools participated in this drama contest. In this competition our school won the first prise. Then I took up Baratham. I fell in love with ...

[26] It is clear that the statement was made by Sujatha in response to a question posed by Sarathi Krishna. Nowhere was the respondent implicated or her name ever mentioned. Sujatha's narratives of her life bears no semblance with the respondent's. Respondent was born in 1983 and in 1986 she was only three years old. She never studied or attended Vivekanantha School and she admitted that her friends knew that she had never acted in local telemovies. In our view the learned judge fell into error when she failed to take into consideration the whole paragraph of the said statement but instead relied solely upon the impugned words to come to her findings. Had she done so, she would have come to the conclusion that the whole paragraph was Sujatha's brief narrative of her life and involvement in the arts scene and has nothing to do with the respondent's personal life.

[27] PW2, the respondent's employer, testified that he had not seen the article but was informed by the respondent herself of the article. It is his unchallenged testimony that the article is not about the respondent. PW1, the respondent's father, admitted that despite having the respondent's photograph, the contents of the article did not refer to the respondent but to Sujatha. PW1 also agreed that the article is about an interview between one Sarathi Krishnan and Sujatha and the said statement was made by Sujatha and not the respondent. He was thinking about his daughter at the time because her photograph was there and never thought about the content of the article of all. Additionally the respondent herself (PW3) had admitted in cross-examination that the said article does not refer to her but Sujatha. She also agreed that the article is about an interview between Sarathi Krishnan and Sujatha. She also agreed that other than her photograph, the article does not specifically mention her or her name and the caption in the box is a quotation with Sujatha's name.

[28] The testimonies of these witnesses enumerated above clearly does not run in tandem with the learned judge's findings that any reader of the article, with the caption beside her photograph, would naturally infer that the respondent was Sujatha as encapsulated in para. 17 of her grounds of judgment.

[29] At the end of the day the twin questions that arises is whether can the article in law, having regard to its language, be regarded as capable of referring to the respondent. Secondly, whether the article, in fact, lead reasonable people, who know the respondent, to the conclusion that it does

refer to the respondent - see *Knupffer v. London Express Newspaper Ltd* [1944] AC 116 as cited in *Masterskill (M) Sdn Bhd v. Sistem Televisyen Malaysia Bhd* [2012] 5 CLJ 296, alluded to by learned counsel for the appellants.

[30] In respect of the first question, for all the reasons enumerated in the preceding paragraphs, we found that the impugned words in the said article, having regard to its language, cannot be regarded as capable of referring to the respondent, despite the fact that the photograph of the respondent was published together with the said article. The learned judge failed to take into account the full context of the said paragraph where the impugned words were part and parcel of the said paragraph. The learned judge also failed to consider that the same is purely an interview between Sarathi Krishnan and Sujatha and the paragraph was Sujatha's answer in response to a question posed to her. Even PW1, PW2 and PW3, the witnesses for the respondents agreed and admitted that the said paragraph is not about the respondent but Sujatha. In all the circumstances of the case, the inference made by the learned judge referred to earlier is devoid of any foundation.

[31] As regard to the second question, we were also of the view that the article, in particular the said paragraph with the impugned words, in fact, does not lead reasonable people who know the respondent to the conclusion that the paragraph referred to the respondent. Our findings were fortified by the uncontroverted testimonies of PW1, PW2 and PW3 adverted to in the preceding paragraphs. Additionally the article did not even identify the identity of the person in the photograph. A reasonable man will not simply jump to a conclusion upon seeing a photograph accompanying an article. Curiosity would prompt him/her to probe further to ascertain what the photograph is all about by reading the article. And if one were to read the article, there can be no doubt that the article or rather the paragraph is all about Sujatha, the actress and has nothing to do with the respondent.

Second Ground - Whether The Words Complained Of Are Defamatory

[32] Since the respondent has not discharged the burden of proving the threshold that the word in the said article indeed referred to the respondent, we opined that there is no necessity to delve into the issue of whether the said words complained of are defamatory of the respondent or otherwise.

[33] For all the reasons given above we allowed both the appellants' appeal. The order of the learned judge is set aside in its entirety. We also made no order as to costs.